Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

ED J. MIRELES, AND PAUL J. ROA,
Petitioners,

v.

UNITED STATES OF AMERICA, AND CHARLES M. CARBERRY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

GLENN ROTHNER *
BERNHARD ROHRBACHER
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101-3115
(626) 796-7555

* Counsel of Record

Attorney for Petitioners

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QUESTIONS PRESENTED

1. Is a charge under a union constitution, against an elected union official for conditioning the employment of appointive union administrators on their making late payments and thus becoming ineligible to run in union elections, preempted by the LMRDA and the federal interest in not restricting the exercise of the right of an elected union official to terminate appointive union administrators, and in light of the fact that this Court has found this right to be an integral part of ensuring a union administration's responsiveness to the mandate of a union election?

2. Under the "substantial evidence" standard of review, must a Court of Appeals reverse a conclusory opinion by an agency that fails to provide a rationale for crediting or discrediting testimony?

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ED J. MIRELES, AND PAUL J. ROA,
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UNITED STATES OF AMERICA, AND CHARLES M. CARBERRY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Ed J. Mireles and Paul J. Roa pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on October 23, 2002, and published on January 2, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit has been ordered published but has not yet been reported in the Federal Reporter. It is reprinted in the appendix hereto, App. A, p. 1a, *infra*. The memorandum and order of the United States District Court for the Southern District of New York granting the Independent Review Board's application to affirm its opinion and decision has not been reported and is reprinted in the appendix hereto, App. B, p. 8a, *infra*. The

opinion and decision of the Independent Review Board has not been reported and is reprinted in the appendix hereto, App. C, p. 14a, *infra*.

JURISDICTION

The Second Circuit entered an unpublished summary order on October 23, 2002, and published that order on January 3, 2003. *See* App. A, pp. 1a, 2a n.1.

This Court has jurisdiction to review the judgment of the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

See App. D, p. 51a, *infra*.

STATEMENT OF THE CASE

Petitioner Ed J. Mireles ("Mireles") served as elected Secretary-Treasurer of Local 952 ("the Local") of the International Brotherhood of Teamsters ("the Teamsters" or "IBT") from 1989 until 1999. Petitioner Paul J. Roa ("Roa") served as an appointive business agent of the Local at the relevant times. On April 17 and 18, 2000, the Independent Review Board ("IRB") established under a consent decree entered against the Teamsters in the same action held a hearing on certain charges against Petitioners. Petitioner Mireles was charged with having "brought reproach upon the IBT" in violation of the IBT constitution by (1) having "required [appointive] Business Agents to fail to make a month's dues payment in a timely manner, thereby making them ineligible to run for office in a Local Union officer election" under the IBT constitution and the Local bylaws; and (2) having "failed to cooperate with the IRB" by falsely testifying before the IRB regarding the practice described in (1). App. C, pp. 15a-16a. Petitioner Roa was charged with "having brought reproach upon the IBT" in violation of the IBT constitution by having "aided and abetted" the practice described in (1). *Id.* at p. 16a.

Following the hearing, on October 17, 2000, the IRB found that Petitioners had brought reproach upon the IBT as alleged in the charges against them. The IRB barred Mireles and Roa "from holding the position as an officer in the IBT or any related entity" for periods of seven and four years, respectively, and suspended them from IBT membership for periods of four and two years, respectively. *Id.* at p. 50a.

On February 21, 2001, the United States District Court for the Southern District of New York, by memorandum order, found that "substantial evidence" supported the IRB's findings of fact and that the sanctions imposed by the IRB were proportionate to the severity of the misconduct of which Petitioners were guilty. *See* App. B, pp. 12a-13a. The district court had jurisdiction under 28 U.S.C. § 1331 because the consent decree that established the IRB resulted from an action brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

Petitioners appealed to the United States Court of Appeals for the Second Circuit. On October 23, 2002, the Second Circuit affirmed the order of the district court. *See* App. A, pp. 2a n.1, 7a.

Petitioners now seek a writ of certiorari in this Court because (1) in one important aspect, the decision by the Second Circuit conflicts with decisions by this Court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of California; and (2) in another important aspect, the decision by the Second Circuit conflicts with a decision by the United States Court of Appeals for the Sixth Circuit.

First, in *Finnegan v. Leu*, 456 U.S. 431 (1982), this Court found the right of an *elected* union official, such as Petitioner Mireles, to terminate *appointive* union administrators, such as the business agents, to be an integral part of ensuring a union administration's responsiveness to the mandate of the union

election and, therefore, of furthering the overriding objective of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. §§ 401 *et seq.* Accordingly, this Court held that an appointive union administrator could not state a claim against an elected union official for termination in violation of the LMRDA. In *Bloom v. General Truck Drivers, Office, Food & Warehouse Union*, 783 F.2d 1356 (9th Cir. 1986), the Ninth Circuit indicated that with narrow exceptions not applicable in the present case, a state claim for wrongful discharge, other than e.g. one for discharge in retaliation for refusal to engage in an illegal act, would be preempted by the LMRDA and *Finnegan*. In *Screen Extras Guild, Inc. v. Superior Court*, 800 P.2d 873 (Cal. 1990) (in bank), the Supreme Court of California, sitting in bank, held that such a claim was indeed preempted by the LMRDA.

The Second Circuit's decision in the present case conflicts with *Finnegan*, *Bloom*, and *Screen Extras Guild*. If an elected union official may not only terminate an appointive union administrator for any reason without facing possible liability under the LMRDA, as *Finnegan* held, but may also do so for political reasons without facing liability under state law for wrongful discharge, as *Bloom* indicated and *Screen Extras Guild* held, then Petitioner Mireles could not only condition the employment of the business agents on their foregoing eligibility to run in union elections without facing liability under the LMRDA, but he could also do so without facing liability under state law for wrongful discharge and, by the same token, under the IBT constitution for bringing "reproach" upon the IBT. In other words, just as the LMRDA preempted the action under state law in *Screen Extras Guild*, it also preempted the charges under the IBT constitution in the present case. To give the LMRDA its proper preemptive reach, this Court should, therefore, reverse the Second Circuit's affirmation of Petitioners' convictions on these charges.

Second, even if the charges against Petitioners were not preempted by the LMRDA, this Court should nevertheless reverse the Second Circuit's affirmation of Petitioners' convictions because the Second Circuit's credibility ruling in this case conflicts with that of the Sixth Circuit in *Director, Office of Workers' Comp. Programs v. Congleton*, 743 F.2d 428 (6th Cir. 1984). In *Congleton*, the Sixth Circuit held that a conclusory opinion that fails to provide a rationale for crediting or discrediting testimony does not warrant affirmance. There is no question that the IRB credited testimony that was disfavorable to Petitioners and discredited testimony that was favorable to Petitioners, in some instances providing only conclusory rationales for doing so and in other instances without providing any rationale, conclusory or otherwise. Under *Congleton*, the IRB's decision therefore did not warrant affirmance. The Second Circuit nevertheless affirmed. This Court should grant a writ of certiorari to resolve the conflict between the Sixth Circuit's decision in *Congleton* and the Second Circuit's decision in the present case.

ARGUMENT

I. THE COURT OF APPEALS' PREEMPTION RULING IN THIS CASE IS NOT ONLY CONTRARY TO THIS COURT'S RULING IN *FINNEGAN*, BUT IT CONFLICTS WITH THE OPINIONS OF THE NINTH CIRCUIT IN *BLOOM* AND THE SUPREME COURT OF CALIFORNIA IN *SCREEN EXTRAS GUILD*.

In *Finnegan*, this Court held that an appointed union employee who is also a union member cannot state a claim for violation of the LMRDA for being discharged by an elected union official. As the reason for this holding, the Court stated that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election" and was thus necessary to serve "the Act's

overriding objective." 456 U.S. at 441. Under *Finnegan*, Petitioners' alleged conduct was protected from prosecution under the LMRDA. The Second Circuit nevertheless held that Petitioners could be prosecuted for that conduct under the IBT constitution. *See* App. A, pp. 3a-5a. But in *Bloom*, the Ninth Circuit indicated that a state claim for wrongful discharge, other than *e.g.* one in retaliation for a refusal to engage in an illegal act, would be preempted by the LMRDA and *Finnegan*. And in *Screen Extras Guild*, the Supreme Court of California, sitting in bank, held that such a claim was indeed preempted by the LMRDA and *Finnegan*. By the same token, the charges against Petitioners for violation of the IBT constitution were also preempted by the LMRDA and *Finnegan*, and the Second Circuit's affirmance of Petitioners' convictions on these charges must be reversed.

A. Under *Finnegan*, Petitioners' Alleged Conduct Was Protected from Prosecution Under the LMRDA.

The Second Circuit affirmed the IRB's finding that Petitioners brought "reproach" upon the IBT, in violation of the IBT constitution, by "institute[ing] a policy requiring IBT members who served as [appointive] business agents of the local union to make dues payments on an untimely basis," thus rendering them "ineligible to run for a local office position." App. A, pp. 2a-3a. Initially, it must be observed that Petitioner Mireles could not have "required" his business agents to make late dues payments. Nor is there any evidence in the record that he did so. At most, Petitioner Mireles allegedly gave his business agents a choice: Make late dues payments—and become ineligible to run in union elections—or lose your appointive job with the union. *See also id.* at p. 5a (Second Circuit characterizes the alleged conduct as merely "the conditioning of union employment on relinquishment of a membership right," i.e., the right to run in union elections); *infra* note 1. As discussed below, under

Finnegan, such a "forced choice between expressing one's opinion [by running in union elections] and losing one's job" is merely "[a]n indirect burden on membership rights" that "is insufficient to state an LMRDA claim." *Bloom*, 783 F.2d at 1359 (citing *Finnegan*, 456 U.S. at 440-42).

In *Finnegan*, Harold Leu had defeated incumbent Omar Brown in an election for the presidency of a IBT local. *See* 456 U.S. at 433. Upon taking office, Leu discharged the locals business agents, all of whom had been appointed by Brown and had openly supported him in the election. *See id.* The discharged business agents filed suit against Leu, alleging violations of the LMRDA, specifically, 29 U.S.C. §§ 411(a)(1), 411(a)(2), 412, 529. *See* 456 U.S. at 434; *see also* App. D, p. 51a-52a.

This Court rejected the claims of the discharged business agents. The Court found the issue of union patronage addressed in neither the language nor the legislative history of the LMRDA and "th[ought] it virtually inconceivable that Congress would have prohibited the longstanding practice of union patronage without any discussion in the legislative history of the Act." 456 U.S. at 441 & n.12. Moreover, prohibiting union patronage would have thwarted "the Act's overriding objective," *i.e.*, "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. The Court observed: "Far from being inconsistent with this purpose, *the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election*." *Id.* (emphasis supplied). The Court concluded, therefore, that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id*; *see also Franza v. Int'l Bhd. of Teamsters*, 869 F.2d 41, 45 (2d Cir. 1989) ("The overriding purpose of promoting union democracy and

political accountability established by the Act would be thwarted were an elected union leader unable to 'choose a staff whose views are compatible with his own'" (quoting *Finnegan*, 456 U.S. at 441)); *Bloom*, 783 F.2d at 1361-62 ("The federal interest in promoting union democracy and the rights of union members . . . includes an interest in allowing union leaders to discharge incumbent administrators").

The Seventh Circuit, the Ninth Circuit, and the California Supreme Court subsequently clarified that elected union officials have the right to discharge appointed administrators not only *after their initial election*, but also *after their reelection* and, as is crucial in the context of the present case, *before their reelection*. *See Brunt v. Service Employees Int'l Union*, 284 F.3d 715, 718-20 (7th Cir. 2002) (administrators who challenged incumbent president in election, supported challenger, or stayed neutral were fired after incumbent's reelection); Bloom, 783 F.2d at 1359, 1362 (administrator who refused to illegally alter minutes of union meeting was discharged by president who believed administrator intended to run against him in upcoming election); *Screen Extras Guild*, 800 P.2d at 881 (noting that "the potential for a staff member to impede implementation of union officials' programs does not automatically decrease or evaporate with the passage of time" and that "[t]he recency of the union elections in *Finnegan* . . . simply has no bearing on the applicability of th[at] case[] to this one"). Thus, an elected union official such as Petitioner Mireles has the right to discharge an appointed administrator at any time during his tenure, and for whatever reason.

There is, therefore, no question that Petitioner Mireles could have simply discharged his business agents without violating the LMRDA. Instead, he allegedly gave them a choice: Make late dues payments—and become ineligible to run in union elections—or lose your appointive job with the union. This is precisely the type of "union patronage"

sanctioned by this Court in *Finnegan* as "an integral part" of ensuring the LMRDA's "overriding objective" of "ensuring a union administration's responsiveness to the mandate of the union election." 456 U.S. at 441. It is a fair assumption that an appointed business agent who is not willing to forego the right to challenge his elected superior in a future election may even now be unwilling to carry out the policies of this superior and may thus not be "responsive[] to the mandate" from the union members who elected this superior. Under *Finnegan*, Petitioner Mireles therefore had the right to exclude this possibility by allegedly giving his business agents a choice to make themselves ineligible to run in union elections or forego employment with the union.

In fact, in *Parini v. Int'l Bhd. of Teamsters*, 568 F. Supp. 1246 (N.D. Ill. 1983), *aff'd*, 749 F.2d 34 (7th Cir. 1984), the United States District Court for the Northern District of Illinois held, and the Seventh Circuit affirmed, that a similar "scheme" did not violate the LMRDA. In that case, IBT officials persuaded IBT member Emil Parini not to run for union office by promising to appoint him after the election as business agent if he did not run. *See* 568 F. Supp. at 1247. Parini did not run and the union officials kept their promise and appointed him as business agent. *See id.* This "scheme" was repeated a second and a third time. *See id.* The fourth time, however, the union officials broke their promise and discharged Parini after the election although he did not run. *See id.* Parini filed suit, claiming that he was "effectively deprive[ed] . . . of the opportunity to run for [u]nion office," in violation of the LMRDA. *Id.* at 1248.

The Northern District of Illinois disagreed because Parini was not "*involuntarily* deprived of his opportunity to run for [u]nion office." *Id.* (emphasis supplied). Instead, Parini "*willingly* . . . relinquished his opportunity to be a candidate time and again in return for . . . renewal of his [u]nion employment." *Id* (emphasis supplied). The union officials'

offer "did not preclude Parini from exercising his rights under the Act." *Id.* at 1249 n.5. Rather, it merely put Parini to a choice similar to that faced by the petitioners in *Finnegan*. *See id.* In fact, whereas the petitioners in *Finnegan* faced a "dilemma" because "if they refuse to campaign for the incumbent they risk his displeasure, and by supporting him risk the displeasure of his successor," 456 U.S. at 442, "the options available to Parini were far less a Hobson's choice than those in *Finnegan*," 568 F. Supp. at 1249 n.5.

Similarly in the present case: Petitioner Mireles' business agents were not involuntarily deprived of their opportunity to run for union office. Instead, they willingly made late dues payments—and thus became ineligible to run in union elections—in return for continued union employment.[1] Petitioner Mireles moreover did not preclude his business agents from exercising their rights under the LMRDA Instead, he allegedly put them to a choice similar to—but far less of a Hobson's choice than—that faced by the petitioner in *Finnegan*. If Petitioner Mireles indeed put his business

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[1] The Court of Appeals therefore erred when it suggested that *Finnegan* and *Bloom* were distinguishable because "[h]ere, the business agents were deprived of their rights as members to run for election to union office." App. A, p. 5a (quoting *United States v. Int'l Bhd. of Teamsters* ("*Carey*"), 156 F.3d 354, 361 (2d Cir. 1998) for the holding that the "act of making a person ineligible to seek union office 'affects him as a member' under federal labor law"). It is, however, *Carey*, not *Finnegan* and *Bloom*, that is distinguishable from the present case. In *Carey*, an election officer disqualified former IBT General President Ron Carey, *against his will*, from standing for office in a rerun of the annulled election that first brought him to office. *See* 156 F.3d at 358. By contrast, in the present case, Petitioner Mireles' business agents *willingly* disqualified themselves from eligibility to run in union elections by making late dues payments. That Petitioner Mireles allegedly asked them to do so is of no importance, even if they would have lost their appointive office had they refused to disqualify themselves from the elections, just as it was of no importance that the plaintiff in *Parini* never would have gotten his appointive office had he refused not to run in the election.

agents to this choice, he no more violated the LMRDA than did his counterpart in *Finnegan*. Rather, he exercised a right under the LMRDA, and, as discussed in the next section, the LMRDA preempts prosecution not only under state law but also under the IBT constitution for the exercise of this right.

B. Under *Bloom* and *Screen Extras Guild*, Because Petitioners' Alleged Conduct was Protected from Prosecution under the LMRDA, It Was also Protected from Prosecution Under the Teamsters Constitution.

Although Petitioners' alleged conduct was, as discussed in the previous section, protected from prosecution under the LMRDA, the Second Circuit nevertheless held that Petitioners could be prosecuted for that conduct under the IBT constitution. *See* App. A, p. 5a ("The issue here is not whether the business agents have an actionable claim for impairment of their membership right to stand for election [in violation of the LMRDA], but whether the conditioning of union employment on relinquishment of a membership right brought reproach upon the union [in violation of the IBT constitution]). But the Second Circuit ignored that, relying on this Court's decision in *Finnegan*, the Ninth Supreme Court indicated in *Bloom* and the Supreme Court of California held in *Screen Extras Guild* that, with narrow exceptions not applicable here, conduct that is protected from prosecution under the LMRDA is also protected from prosecution under state law because the LMRDA preempts state law in this regard. By the same token, because Petitioners' alleged conduct is protected from prosecution under the LMRDA, it is also protected from prosecution under the IBT constitution. The Second Circuit's contrary holding conflicts with *Finnegan*, *Bloom*, and *Screen Extras Guild*, and this Court should grant a writ of certiorari to resolve the conflict.

In *Bloom*, a union administrator filed a wrongful discharge claim under state law, alleging that he was discharged for refusing to illegally alter minutes of a union meeting. *See* 783 F.2d at 1358, 1362. The Ninth Circuit, citing *Finnegan*, observed that "[t]he federal interest in promoting union democracy and the right of union members . . . includes an interest in allowing union leaders to discharge incumbent administrators." *Id.* at 1361-62. The court indicated that "allowing a state cause of action for wrongful discharge" might "generally undermine this federal interest and rob the union leader of discretion needed to serve the wishes of the membership and thus the purposes of the Act." *Id.* at 1362 (citing *Tyra v. Kearney*, 153 Cal. App. 3d 921, 926-27, 200 Cal. Rptr. 716, 719-20 (1984), for its "holding that a state claim for wrongful discharge was preempted by the LMRDA and the Supreme Court's decision in *Finnegan*"). The court, however, found that it did not need to decide the issue, because the petitioner in *Bloom* "allege[d] that he was fired, not for political reasons, . . . but rather because he refused to illegally alter the minutes of a union meeting" and "the federal interest is much lessened under these circumstances." *Id.*

In *Screen Extras Guild*, the Supreme Court of California, sitting in bank, decided the issue left open—albeit with a strong indication as to the outcome—by the Ninth Circuit in *Bloom*. The California Supreme Court observed:

> *Congress intends that elected union officials shall be free to discharge management or policymaking personnel.* Thus, allowing [wrongful discharge] claims to proceed in the California courts would "restrict the exercise of the *right to terminate* which *Finnegan* found [to be] 'an integral part of ensuring a union

> administration's responsiveness to the mandate of the union election.'"

800 P.2d at 880 (citing *Tyra*, 153 Cal. App. 3d at 927, 200 Cal. Rptr. at 719-20 (citing *Finnegan*, 456 U.S. at 441)) (emphasis supplied). The California Supreme Court added:

> To allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent. This would frustrate full realization of the goal of union democracy embodied by the LMRDA, in contravention of the supremacy clause.

Id. at 881. The California Supreme Court concluded: "Consequently, *the LMRDA and the supremacy clause preempt wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees*." *Id.* (emphasis supplied). Such claims are preempted regardless of whether they "relate to the purposes of the LMRDA" or "are routine disputes between an employer and employee." *Id.* at 880.

Bloom and *Screen Extras Guild* stand for the rule that conduct that is protected from prosecution under the LMRDA is also protected from prosecution under state law, except in cases—such as actions for wrongful discharge motivated not by political reasons, but by the dischargee's refusal to engage in an illegal act—in which the federal interest in promoting union democracy and in the preemptive force of the LMRDA is lessened. *See Bloom*, 783 F.2d at 1362; *Screen Extras Guild*, 800 P.2d at 881-82.

As discussed in the previous section, Petitioners' alleged conduct is protected from prosecution under the LMRDA. Moreover, there is no question that the alleged conduct was motivated by political reasons—preventing disloyalty of appointive union administrators to elected union officials—

and the federal interest in promoting union democracy and in the preemptive force of the LMRDA is at its highest under these circumstances. Accordingly, under *Bloom* and *Screen Extras Guild*, Petitioners' alleged conduct was also protected from prosecution under state law.

By the same token, Petitioners' alleged conduct was furthermore protected from prosecution under the IBT constitution for bringing "reproach" upon the IBT.[2] Extending the preemptive reach of the LMRDA in this fashion is not an overly mechanical application of *Bloom* and *Screen Extras Guild*, but instead follows the logic and spirit of these cases by furthering the purposes of the Act. If permitting a cause of action under *general* state law for politically motivated wrongful discharge might undermine the federal interest in promoting union democracy and allowing elected union leaders to discharge appointive union administrators, see *Bloom*, 783 F.2d at 1361-62, then allowing a charge under a *specific* union constitution for conditioning employment on giving up certain political rights might also undermine these federal interests at least to an equal, if not larger, extent. And if "allow[ing] a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent" and would thus "frustrate full realization of the goal of union democracy embodied by the LMRDA," *Screen Extras Guild*, 800 P.2d at 881, then the same is also true—perhaps even more so—of

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[2] Additionally, even if the prohibition against bringing "reproach" upon the IBT is not unconstitutionally vague on its face, it certainly is unconstitutionally vague *as applied to Petitioners*. One can hardly say that "it should have been clear" to Petitioners that the exercise of the rights of an elected official under the LMRDA, would, like "associating with known members of organized crime," bring reproach upon the IBT. *United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1298 (2d Cir. 1991).

allowing a "bringing-reproach-upon-the-union" charge under a union constitution to proceed from conditional employment of union business agents. A union constitution can no more abrogate an elected union official's LMRDA "right to terminate" appointive union administrators, *id.* at 880 (quoting *Tyra*, 153 Cal. App. 3d at 927, 200 Cal Rptr. at 719), than it could abrogate, *e.g.*, a union members LMRDA "right to meet and assemble freely with other members," 29 U.S.C. § 411(a)(2); App. D, p. 51a. Both attempts are preempted by the LMRDA. The Court of Appeals' holding affirming Petitioners' convictions on such a charge conflicts with what the Ninth Circuit indicated in *Bloom* and what the Supreme Court of California held in *Screen Extras Guild*, and this Court should grant a writ of *certiorari* to resolve the conflict.

II. THE COURT OF APPEALS' CREDIBILITY REVIEW RULING IN THIS CASE CONFLICTS WITH THAT OF THE SIXTH CIRCUIT IN *CONGLETON*.

In *Congleton*, the Sixth Circuit held that a conclusory opinion that fails to provide a rationale for crediting or discrediting testimony does not warrant affirmance. In the present case, the IRB credited certain testimony that was disfavorable to Petitioners, and discredited other testimony that was favorable to Petitioners, without providing a non-conclusory rationale for doing so. Under *Congleton*, the IRB's decision should, therefore, not have been affirmed. The Second Circuit, however, refused to review the IRB's credibility determination and affirmed the IRB's decision. The Second Circuit's credibility review ruling conflicts with that of the Sixth Circuit in *Congleton*, and this Court should grant a writ of certiorari to resolve the conflict. The need to adhere to the *Congleton* standard is highlighted in the present case, where some of the credited testimony was that of witnesses who had admittedly perjured themselves in the process.

A. Under *Congleton*, a Conclusory Opinion that Fails to Provide a Rationale for Crediting or Discrediting Testimony Does Not Warrant Affirmance.

In reviewing a decision of the IRB, courts apply the same standard that they apply when reviewing agency actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq. *See United States v. Int'l Bhd. of Teamsters*, 170 F.3d 136, 142 (2d Cir. 1999). Specifically, courts review the IRB's findings of fact for "'substantial evidence' on the whole record." *Id.* at 143. "Although narrow, [such] review . . . must nonetheless be careful, thorough and probing." *Id.* (quoting *Ward v. Brown*, 22 F.3d 516, 521 (2d Cir. 1994)).

In *Congleton*, the Sixth Circuit held that under the APA, it is "critical to the appellate review process" that the finder of fact "clearly set forth the rationale for his findings of fact." 743 F.2d at 429. The Sixth Circuit further held that a workers' compensation award had to be reversed because the finder of fact "merely credited the testimony" of several witnesses but "failed to provide his rationale for crediting this evidence," and that such *"[a] . . . conclusory opinion . . . does not warrant affirmance."* *Id.* at 429-30 (emphasis supplied); *see also Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414, 423 (6th Cir. 2000) (in reviewing an agency decision under the "substantial evidence" standard, reviewing courts "look to whether the agency explained any credibility judgment it made and whether it gave reasons for crediting one piece of evidence over another").

In the present case, the Second Circuit flat out refused to review the credibility determinations of the IRB. Instead, it merely stated that "the members of the IRB are 'best equipped to evaluate the demeanor, credibility, and ultimately the culpability of those who appear before them'" and, further, that "[i]n accordance with the great deference owed to the IRB's determinations, law in this circuit establishes that

a court 'will not substitute its assessment of a witness's credibility for that of the IRB.'" App. A, p. 7a (quoting *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 380 (2d Cir. 2001)).

As shown in the next section, the IRB in this case credited certain testimony and discredited other testimony without providing a non-conclusory rationale for doing so. Under *Congleton*, such an opinion "does not warrant affirmance," 743 F.2d at 430, and the Second Circuit decision nevertheless to affirm the IRB's conflicts with *Congleton*.

B. The IRB Credited Certain Testimony, Including that of Admitted Perjurers, and Discredited Other Testimony, Including that of Petitioners, Without Providing a Non-Conclusory Rationale for Doing so, and the IRB's Decision Should Therefore Have Been Reversed.

The evidence before the IRB at its April 2000 hearing consisted of (1) documentary evidence, chiefly "TITAN" records reflecting IBT members' dues status at the time of a October 22, 1998 IRB report; (2) transcripts of sworn 1996 and 1998 "testimony"[3] of twelve witnesses introduced at the hearing by the IRB Chief Investigator; (3) live testimony of

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[3] We place the term "testimony" in quotation marks because several of these transcripts on which the IRB relied, in lieu of live testimony, were not taken at depositions and did not entail testimony in the usual sense of the term. Instead, these transcripts were merely transcripts of IRB interviews at which neither Petitioner was present or represented, and over which no judicial or quasi-judicial officer presided. The IRB overruled the objections by Petitioners against this hearsay evidence, *see* App. C, p. 30a, and the Second Circuit affirmed this ruling, *see* App. A, p. 6a n.3. Given that much of the evidence relied upon by the IRB was inherently problematic, as explained in this note, the deficiencies in the credibility determinations of the IRB discussed in this section take on a special importance.

five witnesses called by the IRB Chief Investigator, four of which had already given testimony in 1996 and/or 1998; and (4) live testimony of eight witnesses called by Petitioners, including themselves. *See* App. C, pp. 18a-19a. As discussed below, the IRB found the testimony introduced by the IRB Chief Investigator credible and found the testimony introduced by Petitioners not credible, without providing in either case a non-conclusory rationale for doing so. This deficiency in the IRB's credibility determinations is particularly glaring in light of the fact that four of the witnesses whose testimony was introduced by the IRB Chief Investigator and relied upon as credible by the IRB had changed their stories between testifying in 1996 and testifying in 1998 and had thus admittedly perjured themselves on one or the other of these two occasions.

James Boardman ("Boardman") was Petitioner Mireles' chief accuser and the only witness who claimed that Mireles himself had created the alleged dues payments "scheme." In 1996, he testified that "in early 1990, he had been directed by Mireles to implement the dues policy (which included having the Business Agents go on self pay of dues instead of [payroll] check-off and then miss a dues payment so that they would be ineligible to vote or run for office)." *Id.* at pp. 20a-21a. In 1998, Boardman repeated this testimony. *See id.* at p. 23a. At the 2000 hearing, as per admission by the IRB, "Respondents' counsel . . . cross-examined Boardman and was effective in showing Boardman's animosity toward Mireles." *Id.* at p. 40a (emphasis added). Yet, without providing any rationale, non-conclusory or otherwise, the IRB stated: "We . . . accepted as credible Boardman's 1996 and 1998 testimony." *Id.* at p. 41a. Thus, with respect to this all-important witness, and despite its admission that he bore animosity toward Petitioner Mireles, the IRB did not even begin to satisfy the *Congleton* requirement of providing a non-conclusory rationale for its credibility determinations.

The same is true with respect to the IRB's credibility determinations regarding four witnesses against Petitioners who admittedly perjured themselves in either their 1996 or their 1998 testimony, i.e., Frank Sevilla ("Sevilla"), Gloria Smith ("Smith"), Billie Barnes ("Barnes"), and Rosie Frias ("Frias"). One of these witnesses, Sevilla, testified in 1996 that although he had missed dues payments, he had not been encouraged to do so and there had been no particular reason for having done so. *See id.* at p. 23a. The other three witnesses testified in 1996 but not on the alleged dues payments "scheme." *See id.* at p. 22a.

In 1998, "[l]ed by Sevilla," the four witnesses approached the IRB Chief Investigator to "correct," i.e. *change*, their earlier sworn testimony. *Id.* at p. 24a. Sevilla "admitted he had lied in 1996 when he said he had not been encouraged to miss dues payments (he said it was required . . .)."[4] *Id.* at p. 27a. Smith asserted that she had lied in 1996 not only about other matters not at issue here, see id. at p. 25a, but also—to the astonishment of the IRB, which found this at least "curious[]"—about the dues payments "scheme," despite the fact that she had not testified about this "scheme" at that time, *see id.* at p. 35a. Smith now testified that she had heard Boardman tell business agents "that they had to miss their dues, . . . and would be terminated if they did not." *Id.* at pp. 25a-26a. Barnes and Frias likewise admitted that they had lied in 1996 about other matters not at issue here and testified that they had known about the dues payments "scheme." *See id* at 26a.

The IRB had no illusions about what motivated this change of heart and sworn testimony by these four witnesses:

> It appears it was less their conscience that moved them all in this direction than the fact that they were unhappy

[4] It is of course at least equally likely that Sevilla and the other three witnesses who changed their testimony lied in 1998, when they accused Mireles, rather than in 1996, when they exonerated him.

> with Mireles' management of the Local's affairs, and Sevilla admitted that he wanted to regain eligibility since he was thinking of joining with others to defeat Mireles in the upcoming elections.

Id. at p. 24a. Yet despite this motivation, and despite the fact that all four witnesses had admittedly perjured themselves, the IRB went on to credit their changed testimony without providing a non-conclusory rationale.

As to Sevilla, the ringleader of this group who had admittedly committed *perjury on the matters at issue here*, the IRB "found impressive the cross examination . . . by Respondent's counsel in demonstrating Sevilla's *animus towards Mireles* and his *questionable motives* in changing his 1996 sworn testimony." *Id.* at 38a (emphasis supplied). This was the IRB's *only* comment regarding Sevilla's credibility, save a statement that "the fact remains that there was overwhelming evidence from other witnesses and from the TITAN records that corroborated Sevilla's testimony about the dues scheme." *Id.*

Similarly, as to Smith, the IRB stated:

> [N]othwithstanding her *lying* in 1996, and the reasons she conceded she had for *having a prejudice against Mireles*, . . . we ultimately concluded she was a truthful witness before us and in her 1998 testimony, based upon our own impression of her as a witness as she testified and the several elements in the evidence that were consistent only with her telling the truth in 1998 and before us.

Id. at p. 36a (emphasis supplied). The IRB offered no explanation of the basis for its "impression" that Smith was a truthful witness.

And again as to Barnes: "Notwithstanding Barnes' having admittedly *lied* in 1996, . . . we credit her testimony given to

the Chief Investigator in 1998 in that it draws support from other testimony and the TITAN records." *Id.* at p. 31a (emphasis supplied). Finally, and perhaps most egregiously, the IRB made no credibility determination at all regarding Frias, although it repeatedly referred to his testimony as apparently reliable evidence in the remainder of its opinion. *See id.* at pp. 43a, 47a, 48a, 49a.

None of the IRB's discussion of the testimony by these four admitted perjurers constitutes a non-conclusory rationale for crediting this testimony. At most, the IRB asserted that this testimony was credible because it was supported by the TITAN records and other testimony, which for each of the perjurers was primarily that of the other perjurers.[5] As for the TITAN records, they show no more than that in 1990, the Local switched from a check-off system to a self-pay system, *as required by California Labor law*,[6] and that afterwards, the business agents were often tardy in their dues payments, *many times more than needed to make them ineligible to run in union elections*. Such innocent evidence cannot lend credibility to the testimony of the four admitted perjurers that Petitioner Mireles created a system conditioning union employment on late payment of union dues to make union employees ineligible to run in union elections. Nor does it lend credibility to the testimony of each perjurer that it was "corroborated" by the testimony of three other perjurers. The IRB engaged in classic "bootstrapping," apparently believing

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[5] Petitioners reiterate that in Frias' case, as in Boardman's case, the IRB did not even do that and did not provide *any* rationale, non-conclusory or otherwise, for crediting her testimony.

[6] Sections 221-24 of the California Labor Code make it unlawful for an employer "to withhold or divert any portion of an employee's wages" unless "a deduction is expressly authorized in writing by the employee." CAL. LAB. CODE § 224 (West 1989). The Local had no written authorization from the tardy business agents to deduct union dues from their wages.

that if enough witnesses admittedly perjure themselves in a concerted effort, their testimony becomes credible.

The IRB dealt with the credibility (or lack thereof) of the testimony by Grant Ruff ("Ruff") in a similar fashion, deeming it credible—despite the fact, acknowledged by the IRB, that Ruff was fired by Petitioner Mireles for using a Local credit card for personal expenses and thus had reason to wish Mireles ill—because it was supported by the testimony of other witnesses and the TITAN records. *See id.* at pp. 33a-34a. Finally, as was the case with Boardman and Frias, the IRB did not provide *any* rationale, non-conclusory or otherwise, for crediting the testimony of Michael McDonald ("McDonald"). Instead, the IRB simply stated: "We found McDonald credible and accepted his testimony as true." *Id.* at p. 38a. Under *Congleton*, that is not nearly enough.

The IRB discredited the testimony by witnesses called by Petitioners in a similar, at best conclusory, fashion. With respect to specific testimony by Petitioner Mireles himself, the IRB simply stated: "We did not find Mireles' explanation credible." App. C, p. 33a n.9. More generally, the IRB said about Mireles' testimony:

> We did not find Mireles to be a credible witness. Not only was his testimony inconsistent with the testimony of numerous witnesses—in each case he had denied what another witness said—but we found him to be evasive and non-responsive to questions critical to the case. Finally, we found it totally unacceptable that he seemingly knew so little about what was going on in his union.

Id. at p. 42a. Here, the IRB once more engaged in "bootstrapping": Because Mireles consistently denied the charges against him—i.e., that he created a dues payments "scheme" by which his business agents made themselves ineligible to run in union elections as a condition on their

employment—and thus contradicted his accusers, he lacked credibility. Apparently, in the eyes of the IRB, the only way in which Mireles could have become a credible witness would have been for him to admit the charges.

The IRB's approach to the testimony by Petitioner Roa and James Fitzgerald ("Fitzgerald") is the mirror image to its approach to the testimony by Sevilla, Smith, and Barnes. The IRB concluded that "Roa's protest that he was not involved in the scheme to force Business Agents to make late payments is not credible." *Id.* at p. 45a. As a reason for this conclusion, the IRB stated: "From the documentary evidence of the TITAN records and his prior sworn examination testimony to the contrary, . . . Roa's denial of the existence of the scheme is difficult to accept." *Id.* And similarly regarding Fitzgerald: "[W]e could not credit Fitzgerald's testimony" because "[i]t was unsupported by anyone" and "at odds with the credible evidence." *Id.* at p. 40a. But just as the innocent TITAN records do not add to the credibility of the testimony by Sevilla, Smith, and Barnes, they also do not subtract from the credibility of the testimony by Roa and Fitzgerald. In addition, the IRB left wholly unexplained why the "prior sworn examination testimony to the contrary" by Sevilla, Smith, and Barnes did not make them non-credible witnesses, but the "prior sworn examination testimony to the contrary" by Roa made him a non-credible witness.

The IRB rejected other testimony by Petitioner Roa even more summarily: "Again, we found Roa not a credible witness." *Id.* at p. 45a. This was also the IRB's attitude towards testimony by Harry Ashley ("Ashley") and Marvin Anderson ("Anderson"): "We found it difficult to credit Ashley's testimony . . . ." *Id.* at p. 39a. "We gave [Anderson's] testimony little weight . . . ." *Id.* at p. 40a. In each of these cases, the IRB did not provide any rationale, non-conclusory or otherwise, for discrediting the testimony by these witnesses.

In determining that the witnesses in this case were either credible (if they testified *against* Petitioners) or not credible (if they testified *for* Petitioners), the IRB provided at best conclusory rationales. More egregiously, in determining that Boardman, Frias, and McDonald were credible witnesses and that Ashley and Anderson were not credible witnesses, the IRB provided no rationale at all, not even a conclusory one. As discussed above, this also holds true of the IRB's credibility determination as to part of Mireles' and Roa's respective testimony. The IRB thus violated the rule announced by the Sixth Circuit in *Congleton* that a finder of fact must "provide his [or her] rationale for crediting . . . evidence" and that "[a] . . . conclusory opinion . . . does not warrant affirmance." 743 F.2d at 429-30. The Second Circuit nevertheless affirmed the IRB's opinion and thereby created a circuit conflict. This Court should grant a writ of certiorari to resolve this conflict.

CONCLUSION

For the reasons stated, the Court should grant this petition for a writ of certiorari and grant plenary review.

Respectfully submitted,

GLENN ROTHNER *
BERNHARD ROHRBACHER
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101-3115
(626) 796-7555

* Counsel of Record

Attorney for Petitioners

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